

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

TURLOCK UNIFIED SCHOOL DISTRICT.

CASE NO. 2023070719

DECISION

NOVEMBER 2, 2023

On July 24, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents on behalf of Student, naming Turlock Unified School District, called Turlock. Administrative Law Judge Alexa Hohensee heard this matter by videoconference on September 12, 13, 14, 18, 19, 20 and 21, 2023.

Attorneys Sheila Bayne and Robert Burgermeister represented Student. Parent attended all days on Student's behalf. Attorneys Tilman Heyer, Marcy Gutierrez, and John Louis Chiappe represented Turlock. Erika Tschantz, Director of Special Education, or David Lattig, Assistant Superintendent, attended each day of hearing on Turlock's behalf.

At the parties' request the matter was continued to October 16, 2023, for written closing briefs. The record was closed, and the matter was submitted on October 16, 2023.

## ISSUES

A free appropriate public education is called a FAPE. An individualized education program is called an IEP.

The issues have been renumbered without other change to place the eligibility analysis before the analysis of the individual components of the IEP developed on October 6 and 25, 2022.

1. Did Turlock deny Student a FAPE during the 2021-2022 school year, by failing to offer in the October 14, 2021 IEP:
  - a. sufficient intensive individual services in the form of a one-to-one aide?
  - b. a behavior intervention plan?
  - c. parent training in behavior?
  
2. Did Turlock deny Student a FAPE during the 2022-2023 school year, by failing to find Student eligible for special education services in the IEP developed on October 6, and 25, 2022, under:
  - a. other health impairment?
  - b. specific learning disability?

3. Did Turlock deny Student a FAPE during the 2022-2023 school year, by failing to offer in the IEP developed on October 6 and 25, 2022:
  - a. sufficient intensive individual services in the form of a one-to-one aide?
  - b. a behavior intervention plan?
  - c. extended school year services?
  - d. parent training in behavior?
4. Did Turlock deny Student a FAPE during the 2022-2023 school year, by failing to offer an assessment in occupational therapy at the October 6, and 25, 2022, IEP team meetings?
5. Did Turlock deny Student a FAPE during the 2022-2023 school year, by failing to address in the IEP developed on October 6, and 25, 2022, Student's regression in behavior?
6. Did Turlock deny Student a FAPE during the 2022-2023 school year, by denying Parents meaningful participation in the October 6, and 25, 2022, IEP team meetings, by failing to:
  - a. offer new IEP goals in academics, organization, and behavior?
  - b. grant Parent's requests for a one-to-one aide and parent-teacher communications?

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Student had the burden of proof on all issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 14 years old and in ninth grade at the time of hearing. Student resided within Turlock's geographic boundaries at all relevant times. Student was diagnosed with attention deficit hyperactivity disorder, called ADHD. Student was eligible for special education from May 2016 until he was exited from special education on October 25, 2022. Prior to October 25, 2022, he was eligible under the categories of other health impairment due to attention processing difficulties, and specific learning disability due to an attention disorder that affected Student's ability to understand mathematics.

#### ISSUES 1a THROUGH 1c: DID THE OCTOBER 14, 2021 IEP DENY STUDENT A FAPE?

Student contends the October 14, 2021 IEP denied him a FAPE by failing to offer a one-to-one aide, a behavior intervention plan, and parent training on Student's disabilities. Turlock contends it offered Student a FAPE, and Student did not require any of those services.

A FAPE means special education and related services that are available to an eligible child that meet state educational standards at no charge to the parents. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make

progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 403 [137 S.Ct. 988, 1000].)

An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is a snapshot, not a retrospective. (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

#### ISSUE 1a: THE FAILURE TO OFFER A ONE-TO-ONE AIDE IN THE OCTOBER 14, 2021 IEP DID NOT DENY STUDENT A FAPE

Student contends he should have been offered a one-to-one aide for behavior because he acquired six tardies in the first quarter of the 2021-2022 school year and teachers reported that Student had to wait outside of class to cool down, needed support to stay on task, needed support to work independently, and distracted others. Turlock contends Student's behaviors did not rise to the level where he needed a one-to-one aide.

The evidence did not demonstrate that Student needed a one-to-one aide for his behaviors in October 2021, or at any time during the 2021-2022 school year.

Like other students in Turlock, Student received instruction online for most of the 2020-2021 school year due to COVID-19 pandemic school closures. When Student returned to in-person instruction for seventh grade in the 2021-2022 school year,

Student was one of many students who experienced temporary adjustment difficulties at the beginning of the school year. Student was loud, blurted out in class, and talked to classmates.

In addition, Student moved from an elementary school instructional day with one teacher and one classroom to a middle school instructional day with multiple teachers and multiple classrooms. Many seventh grade students had difficulty learning the classroom rules and expectations of multiple teachers. Student's teachers gave him a few detentions which he served for 15 minutes at lunch as part of the school's positive behavior intervention program.

Student's teachers knew Student was diagnosed with ADHD and had an IEP. They employed the accommodations in Student's IEP, including

- positive redirection,
- preferential and strategic seating near the teacher and away from distractions to increase focus,
- extended time on assignments,
- opportunities to retake tests,
- requests to take cool down breaks outside the classroom, and
- positive reinforcers.

Each of Student's teachers used the schoolwide positive reinforcement of handing out school dollars to purchase prizes from the student store, or classroom reward systems to earn class privileges and prizes. These accommodations and positive behavior reward systems worked well for Student. By six weeks into the school year Student learned

classroom expectations and settled into his classes. Student's inattentiveness, distractibility, and impulsivity were easily managed by his teachers, and Student was doing well in all his classes.

Outside of the classroom during unstructured activities, Student continued to have difficulty with impulsiveness. For the first month of the 2021-2022 school year, Parent dropped Student off at school an hour before the school day started, where he played on the playground with minimal supervision. During this time, Student earned detentions for rough housing, horseplay, and minor playground incidents such as arguing and slight pushing. Student sometimes made derogatory comments, such as degrading another student's favorite sports team, often referred to as trash talk, but did not get into intense verbal arguments or physical fights. Student was an athlete who loved all sports, particularly basketball. He was sometimes tardy leaving the playground to go to class. The playground detentions and tardies stopped when Parent brought Student to school at the start of the instructional day.

Student's IEP in effect at the beginning of the 2021-2022 school year required Turlock to provide Student with one class period per day of specialized academic instruction to help him with math and organization, and other academics as needed. That class was called Tutorial. In addition to the IEP accommodations, Turlock provided Student's teachers with 30 minutes per month of consultation with a board-certified behavior analyst to support Student, and Student received weekly 30-minute sessions with a school counselor to learn strategies for social interactions and his emotional health.

Student's yearly IEP review was conducted on October 14, 2021. Student's Tutorial teacher and case manager for seventh grade, Dylan Ferreira, collected



information from Student's teachers for the IEP team meeting. Teachers reported Student was well-mannered with good behavior, but had a lot of energy that required redirection, prompting, and the other accommodations in his IEP. They reported Student was respectful, wanted to do well in class, and was working at grade level. Student missed homework assignments in a couple classes, but by October 2021 had made up those assignments and was earning grades of B's or C's, with an A in physical education. Student communicated well, had good attendance, navigated the campus with ease, had many friends, and enjoyed time with his peers.

Student met all the annual goals from his October 22, 2020 IEP. He met his behavioral goal of learning positive coping strategies and social skills to stay out of physical and verbal disputes, which had been a problem in prior years. Student met his task completion goal of turning in assignments within the time permitted by his IEP and classroom rules, and met his math computation goal.

Although Student stopped engaging in roughhousing before school after Parent no longer dropped him off early, he occasionally engaged in horseplay and roughhousing during the school day in unstructured passing periods and could be disruptive in class by talking out loud or with peers. To address this issue, the October 14, 2021 IEP team developed and adopted two social emotional goals. One was to engage in positive communication with staff and peers, use an appropriate tone and voice in class, and refrain from physical or verbal disputes. The other required Student to identify and express positive feelings and strengths to build confidence and self-esteem. To continue support in academics, the team wrote a math goal for Student incorporating grade level standards, and an organizational goal for Student to track his homework with a daily log signed by Parent. The team developed a total of four annual IEP goals.

To help Student achieve the math and organization goals, the October 14, 2021 IEP offered specialized academic instruction for 180 minutes per week, which was the equivalent of one period a day in Tutorial. The IEP offered Student's general education and special education teachers 30 minutes per month of behavior consultation for strategies to support Student's social emotional goal, and offered Student 30 minutes per week of individual counseling. The IEP offered 150 minutes per year of social work services to be provided in the home to support Student's social emotional goals.

The October 14, 2021 IEP also offered a wide range of accommodations to Student, including:

- preferential seating,
- positive redirection,
- use of a journal to express personal ideas,
- breaks inside the classroom or just outside of the classroom door,
- access to fidget items, access to a trusted adult,
- daily check-in and rewards for good behavior,
- extended time on quizzes and to make up assignments, and
- permission to retake tests within one week.

Parent consented to the IEP at the meeting on October 14, 2021.

At the October 14, 2021 IEP team meeting, Parent's primary concern was communication with Student's teachers. Each of Student's teachers regularly posted homework status and grades to Turlock's online system for parents and students, but Parent wanted more communication regarding Student's behavior. Parent reported Student had once shut down at home after he received a detention at school.

Parent was a diligent advocate for Student. Parent had been disciplined in school during childhood and did not want Student to have similar bad experiences. Parent paid Student money for good grades to motivate him, and complained to teachers and administration if Student was given detention or any other consequence for inappropriate behavior. Parent persuasively testified that Student thrived on in-home instruction during the pandemic school closures because Parent did not impose expectations on Student throughout the school day, and Student could work at his own pace, on his own schedule, with movement breaks whenever Student wanted them. Parent talked out problems with Student and infrequently administered consequences.

Student's seventh grade general education math teacher Christine Gonzales was at the October 14, 2021 IEP team meeting. At the meeting and at hearing, Gonzales explained once Student settled down after the first few weeks of the school year, Student behaved appropriately, was compliant with directions, did assignments without resistance, and needed no more redirection than the typical seventh grader. Student responded to Gonzales's classroom positive reinforcement policies and was a good student. Gonzales opined at hearing that Student's IEP accommodations offered in the October 14, 2021 IEP were sufficient to manage his behavior throughout the 2021-2022 school year and he did not need a one-to-one aide.

Tutorial teacher Ferreira similarly opined that Student was respectful, followed directions, had only minor disruptive behaviors, and did not need a one-to-one aide during the 2021-2022 school year. Student could be distracted, but that was typical of seventh grade boys. Ferreira based his opinion on observations of Student in Tutorial, on the playground, and on the reports of Student's teachers collected by Ferreira for the

October 2021 IEP team meeting. He opined Student's behaviors by October 2021 could be managed with classroom reward systems and accommodations incorporated into the October 14, 2021 IEP.

Board certified behavior analyst Bernard Karamgolpaschin consulted with Student's teachers as a related service on Student's October 14, 2021 IEP. He explained at hearing that before October 2021, Student was still testing the waters, that is, attempting to establish who he was in the middle school setting. Student wanted to be a funny guy that everyone liked and spoke out in class to get attention. Student was good at making friends and was not defiant or uncooperative. Karamgolpaschin told the October 14, 2021 IEP team although Student needed multiple reminders, Student did not refuse to comply with teacher directions, and his behaviors could be managed with accommodations and the support of ongoing behaviorist consultations. Karamgolpaschin opined at hearing that Student did not need a one-to-one aide on October 14, 2021, or at any time during the 2021-2022 school year.

School counselor Amanda Antis told the team Student enjoyed positive praise and was motivated to do well but needed to learn to be less emotionally dysregulated during unstructured times such as lunch and after school. At hearing, Antis explained that it was typical to see behaviors at the beginning of the school year as students

- returned from summer,
- had different sleep schedules,
- adjusted to a new set of teachers, and
- navigated classroom rules and expectations.

However, students, including Student, exhibited less behaviors once they got into a routine. Antis also opined at hearing that Student did not need a one-on-one aide in his classes at the time of the October 14, 2021 IEP or at any time during seventh grade.

Student's middle school assistant principal during seventh grade, Augustin Arreola, who was also at the October 14, 2021 IEP team meeting, explained at hearing that distance learning impacted the behavior of most students upon their return to the school environment for the 2021-2022 school year. Student's behaviors, while needing to be addressed, were not uncommon. Student had verbal disagreements with his peers during unstructured time, but was not a bully or aggressive. Arreola opined that Student did not need a one-to-one aide for his behavior outside the classroom during the 2021-2022 school year.

The Turlock teachers, service providers, and administrator from the 2021-2022 school year were each called as witnesses by Student. Each was credentialed or licensed in their respective field, very experienced, and well-qualified for their positions. Each of these witnesses testified with a professional demeanor, answered questions readily and fully, and had good recall of Student and their involvement in Student's educational program. Gonzales and Ferreira had Student in their classrooms during the 2021-2022 school year and had day to day interactions and observations of Student upon which to form their opinions as of October 14, 2021. Antis met with Student weekly to work with Student on coping strategies and self-esteem. Karamgolpaschin met monthly with all of Student's teachers regarding Student's behaviors in their classrooms. He had observed Student in their classrooms and spoken to each of them once or twice before the IEP team meeting. Arreola observed Student regularly on the playground and met with

Student one-to-one at least five times. These witnesses' testimony regarding Student and his educational needs in October 2021, and throughout the 2021-2022 school year, was credible and persuasive.

Student claimed in his complaint that Student's behavior was extreme in his history, science, and language arts classes in October 2021. However, those teachers did not testify, and the weight of all evidence, including the testimony of Gonzales, Ferreira, Karamgolpaschin, Antis and Arreola established that Student's behaviors were manageable with IEP accommodations, including positive behavior reward systems, teacher consultations, and individual counseling by October 2021, across all school environments, both structured and unstructured.

Parent's testimony undermined her claim that a FAPE required Turlock to offer a one-to-one behavior aide. Parent conceded at hearing that Student was a good student and did not need a one-to-one aide to access the curriculum. Parent also stated that Student, as a social middle school student, would not want an adult always with him. Parent envisioned an aide on stand-by in the school office or elsewhere and available for Student any time he was having difficulty in class or on the playground. Parent opined that if Student's teachers and campus supervisors had time to redirect Student or discipline him for his behavior, they had time to call the office for a one-to-one aide to come and assist Student.

Parent's primary concern throughout her testimony was that Student not be disciplined, which Parent found traumatic during Parent's own childhood. Parent was not a credentialed teacher, a board-certified behaviorist, or a licensed mental health professional. Parent had not observed Student at school during the 2021-2022 school year. Parent's testimony about the desire to protect Student from disciplinary

consequences was insufficient to establish Student needed a one-to-one aide, let alone an aide on call for the infrequent times Student's behaviors may have required adult intervention.

The evidence did not establish Student required a one-on-one behavior aide to avoid loss of instructional time. Student's complaint quotes a statement from an October 2021 teacher report that at times Student had to be reminded to settle down outside of class before being let in. Student argues without persuasive evidentiary support that the statement implies Student was left in the school corridor alone during instructional time, but would not have missed that time if a one-on-one aide had been available to guide his behavior. Although the teacher who wrote that report did not testify, teachers from eighth grade and Arreola from seventh grade explained that in general, particularly after recess or lunch, students were rambunctious and had to be reminded to settle down while lining up at the door before class. Students sometimes were directed to go back outside for a few seconds and reset and did not miss any instructional time by doing so. Asking Student to step just outside of the classroom for a break or to cool down was an accommodation in Student's October 14, 2021 IEP. Student presented no evidence aside from Parent's hearsay testimony that Student had lost any, let alone significant, instructional time by being asked to step outside of the classroom and reset.

The evidence did not establish Student required a one-on-one aide for behavior to access grade level curriculum. Student asked witnesses at hearing about Student's below standard grades on statewide testing from spring 2021 in English language arts and math, and whether these scores demonstrated Student was not at grade level in fall 2021. Multiple teachers testified that statewide testing produced a snapshot in time and was surprisingly unaligned with actual grade level curriculum, so was not an accurate

measure of whether Student understood the curriculum. Teachers and Arreola testified credibly that many if not most students performed poorly in the spring 2021 testing, which took place at the end of COVID-19 pandemic distance learning. Student was earning average grades at the time of the October 14, 2021 IEP, including a B in Gonzales's math class and a C in English language arts with the support of a Tutorial class, accommodations, behaviorist consultations with Student's teachers, and individual counseling. Student could access the general education curriculum with these supports and without a one-to-one behavior aide.

Student's seventh grade transcript stated Student failed classes during the first quarter of the 2021-2022 school year at Turlock Junior High, just before the October 14, 2021 IEP team meeting. However, Student never attended Turlock Junior High. The failed grades were an error on the transcript reflecting that Student had been enrolled in, but never attended, those classes. Because this was a transcript error, no weight was given to the failing grades on the transcript.

Student failed to meet Student's burden of proving by a preponderance of the evidence that Turlock denied him a FAPE during the 2021-2022 school year by failing to offer sufficient intensive services in the form of a one-to-one aide in the October 14, 2021 IEP. Turlock prevailed on Issue 1a.

#### ISSUE 1b: THE FAILURE TO OFFER A BEHAVIOR INTERVENTION PLAN IN THE OCTOBER 14, 2021 IEP DID NOT DENY STUDENT A FAPE

Student contends that because his October 14, 2021 IEP stated his disability impacted his ability to progress in the general education curriculum or participate in the general education setting without accommodations or modification, he should have



been offered a behavior intervention plan. Turlock contends Student's behaviors were appropriately managed with the accommodations and supports offered in the October 14, 2021 IEP.

In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider the use of positive behavioral interventions, supports and strategies. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) The federal regulations implementing the IDEA require the IEP team to consider the use of positive behavior interventions, supports and other strategies, but they do not specify the interventions, supports or strategies that must be used. (71 Fed. Reg. 46683 (Aug. 14, 2006).) The team may address the behavior through annual goals (34 C.F.R. § 300.320(a)(2)(i)), and may include modifications, support for teachers, and any related services necessary in the IEP to achieve those behavioral goals. (34 C.F.R. § 300.320(a)(4).)

The October 14, 2021 IEP team put a variety of positive behavior interventions, supports and strategies in the IEP to address Student's behaviors. It developed a social emotional goal to engage in appropriate social interactions to address Student's occasional disruptive behaviors in class and his behavior towards peers during unstructured times on the middle school campus. The IEP team developed a social emotional goal for Student to build confidence and self-esteem rather than attempt to fit in by clowning around and disrupting class or earning negative consequences. In support of those goals, the October 14, 2021 IEP also offered behavior intervention services in the form of behaviorist consultation with the special and general education

teachers to teach them strategies to support Student and help him reach his goals. Accommodations were added to give Student and teachers the tools to address behaviors in real time, such as

- preferential seating,
- strategically placed help,
- positive redirection,
- breaks, and
- rewards for good behavior.

Turlock offered Student weekly individual counseling to learn strategies for positive interactions and greater self-esteem. These positive behavior interventions, supports and strategies were reasonably calculated to, and did, manage the behaviors that interfered with Student's learning and that of others. An additional behavior intervention plan was unnecessary.

The evidence did not demonstrate Student required a behavior intervention plan. All teacher testimony and reports from the 2021-2022 school year established that although Student had a rough start at the beginning of seventh grade, his behavior in the classroom was manageable with the

- accommodations in the IEP,
- classroom positive behavior reward systems,
- teacher-behaviorist consultations, and
- individual counseling.

By October 14, 2021, Student's math and history teacher reported no behavioral issues in their classroom. Student's physical education and Tutorial teachers reported Student

was participating well. Student's science teacher merely reported that Student needed to practice independent work skills and complete assignments to get a better grade. These reports did not reflect a student who required additional behavior intervention.

Parent testified she believed Student's accommodations were being implemented in a cruel and abusive manner. Parent considered teachers asking Student to step outside the room to reset, or seating Student away from distractions, was isolating Student from his peers rather than managing Student's behaviors. However, there was no evidence beyond Parent's speculation that the accommodations in Student's IEP were implemented in a cruel and abusive manner.

Substantial evidence established the services and accommodations in the October 14, 2021 IEP managed Student's behaviors and did not isolate him from his peers. Student actively participated in and contributed to classroom discussions, worked well in groups, and had friends in each of his classes. School counselor Antis worked with Student weekly on his social emotional goals during the 2021-2022 school year, and testified credibly that Student acknowledged that IEP accommodations helped him regulate behavior in the classroom. Student was self-aware. Student knew that he talked to his friends in class, and appreciated being seated away from them so he could focus on the teacher and his work instead. Student knew that he was loud and outspoken in classes that were louder in general. Student wanted positive in-class interactions but did not understand how to achieve them. Student was very engaged with Antis in learning how to communicate with teachers better, advocate for himself, and interact with peers appropriately and with confidence. By October 2022, with the services and accommodations in the October 14, 2021 IEP, Student learned how to interact appropriately and generalize his communication skills to both academic and

social settings, and met his two social emotional goals. This provided persuasive corroborative evidence that a behavior intervention plan was not required to offer Student a FAPE at the time of the October 14, 2021 IEP.

The positive behavioral reward systems in each of Student's classes and on the middle school campus supported Student's appropriate behavior. Student was highly motivated to earn rewards. The positive behavior rewards available in each of Student's seventh grade classes, with his IEP accommodations, teacher collaboration with Karamgolpaschin, and counseling with Antis, were sufficient for Student to act appropriately compared to his typical peers by the end of the 2021-2022 school year.

Student did not meet Student's burden of proving by a preponderance of the evidence that Turlock denied him a FAPE during the 2021-2022 school year by not offering a behavior intervention plan in the October 14, 2021 IEP. Turlock prevailed on Issue 1b.

#### ISSUE 1c: THE FAILURE TO OFFER PARENT TRAINING IN THE OCTOBER 14, 2021 IEP DID NOT DENY STUDENT A FAPE

Student contends Turlock was on notice that Student had behavior and organization problems at school and at home, and should have offered parent training in behavior in the October 14, 2021 IEP. Turlock contends Student was doing well in school with the in-school services offered, and Parent declined the social work services offered to help Parents provide in-home support consistent with in-school support.

The IDEA regulations permit, but do not require, school districts to offer parent counseling and training to assist parents in understanding the special needs of their child and to acquire the necessary skills to support the implementation of their child's IEP. (34 C.F.R. § 300.34(c)(8)(i)-(iii); Ed. Code, § 56363, subd. (b)(11).) The services that must be identified in the IEP are those that will be provided to enable the child to:

- advance appropriately towards obtaining annual goals,
- be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and
- be educated and participate in school activities with other children with and without disabilities. (34 C.F.R. § 300.320(a)(4).)

Student offered no evidence that parent training was necessary for Student to achieve his goals, make progress in the general education curriculum, or be educated and participate with other children in school activities. Parent testified repeatedly that Student did not have behaviors at home because Parents knew how to best interact with Student, and Parent adamantly insisted that she knew better than school staff how to motivate and manage Student. Such testimony demonstrated that training Parents in behavior and how to manage Student was unnecessary. Student also failed to show how parent training was necessary to support Student in managing behaviors at school.

Parent did not request parent training in behavior at the October 14, 2021 IEP team meeting. However, the October 14, 2021 IEP included social work services that Parents could have used to learn about Student's disabilities and support Student in meeting his IEP goals using strategies consistent with those used in school. Although Parent consented to the IEP, Parent declined social work services when Turlock tried

to set them up because Parent felt in-home services by Turlock staff violated the family's privacy. Parent's preference for one type of parent training over another which addressed the same issue, had Parent expressed that preference at the IEP team meeting, did not obligate Turlock to offer a type of parent training other than social work services. (See *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 (*Vashon Island*).)

Parent testified unpersuasively that had Parents known various forms of parent training were available, Parents might have been interested in those. However, Student did not clarify what type of parent training Parents thought should have been offered at the IEP team meeting in lieu of social work services, or how a different type of parent training would support Student in meeting his IEP goals. All parents of Turlock students had training in various disabilities available through Turlock's Community Advisory Committee. Turlock gave Parents a copy of parents' rights and procedural safeguards before the October 14, 2021 IEP team meeting informing them that the Community Advisory Committee offered free parent training. Parents did not inquire about or attend any of those classes. This further undermined the persuasiveness of Parent's claimed need for parent training at the time of the October 14, 2021 IEP.

Student did not meet Student's burden of proving by a preponderance of the evidence that Turlock denied him a FAPE during the 2021-2022 school year by not offering parent training in behavior in the October 14, 2021 IEP. Turlock prevailed on Issue 1c.

## ISSUES 2a AND 2b: WAS STUDENT ELIGIBLE FOR SPECIAL EDUCATION IN OCTOBER 2022?

Student contends he was denied a FAPE because Turlock did not find him eligible for special education and related services in the October 25, 2022 IEP, under other health impairment or specific learning disability. Turlock contends Student did not need special education or related services by October 25, 2022, and was ineligible under either category.

As a preliminary matter, at hearing Student referred to the October 6, 2022 and October 25, 2022 IEPs as separate offers of FAPE. They were not. One offer of FAPE was developed over two IEP team meetings on October 6, and October 25, 2022. Accordingly, this Decision will analyze the offer of FAPE contained in the IEP dated October 25, 2022.

Whether a student is eligible for special education and related services under the IDEA is a two-part inquiry. First, a student must have a disability in one of the recognized disability categories. Second, as a result of that disability the child must need special education and related services. (20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.8(a)(1).)

Similarly, California law, which refers to students with disabilities as individuals with exceptional needs, defines an individual with exceptional needs as one who, because of a disability, requires instruction and services which cannot be provided with modification of the regular school program to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subds. (a) and (b).) A child may have a qualifying disability,

yet not be found eligible for special education if the student does not meet the IDEA eligibility criteria. (See *Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1107-1108, and 1110.)

A pupil must be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.)

The term special education means specially designed instruction to meet the unique needs of individuals with special needs. (Ed. Code, § 56031.) Related services include such developmental, corrective, and other supportive services as may be required to assist an individual with exceptional needs to benefit from special education instruction. (Ed. Code, § 56363.)

California law recognizes that ADHD may be an underlying processing deficit for eligibility under two categories: other health impairment and specific learning disability. A student whose educational performance is adversely affected by a suspected or diagnosed ADHD, and who also meets the eligibility criteria for other health impairment or specific learning disability, is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

## ISSUE 2a: STUDENT WAS NOT ELIGIBLE FOR SPECIAL EDUCATION IN THE CATEGORY OF OTHER HEALTH IMPAIRMENT

Student contends he should have been found eligible for special education under other health impairment because he had ADHD that interfered with his learning and the



learning of others. Turlock argues Student's attention deficit and hyperactivity did not have a significant adverse effect on Student's educational performance to the degree that he required special education.

Other health impairment is defined, in relevant part, as having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as attention deficit hyperactivity disorder that adversely affects a child's educational performance. (34 C.F.R. § 300.8(c)(9); see also Cal. Code Regs., tit. 5, § 3030, subd. (f).) As with other eligibility categories, a student within the definition of other health impairment must demonstrate that the degree of their impairment requires specially designed instruction. (Cal. Code Regs., tit. 5, § 3030, subd. (a).)

Student had ADHD, which limited his alertness by making him easily distractible and made it difficult for him to sustain attention, for which he needed common general education accommodations in the classroom such as preferred seating, extra time on assignments, and the ability to retake tests. Accordingly, he had a disability within the definition of other health impairment. However, even with a qualifying disability, Student was required to also prove that by October 25, 2022, he needed special education and related services that could not be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); Cal. Code Regs., tit. 5, § 3030, subd. (a).)

Students who are not eligible for special education, but who have physical or mental impairments that significantly interfere with one of life's major activities, may still

be entitled to general education accommodations in a 504 plan. A 504 plan is a plan developed by school personnel and parents in conformity with Section 504 of the Rehabilitation Act of 1973. (See 29 U.S.C. § 701 et seq.)

In preparation for a three-year review of Student's educational program, Turlock conducted a psychoeducational assessment in October 2022 to determine Student's present levels of cognitive functioning, whether Student continued to meet the criteria for other health impairment and specific learning disability, and whether Student required special education. The psychoeducational assessment was performed by Yolanda Tituana, Ed.D., a highly qualified school psychologist with over nine years of experience assessing special needs students. Dr. Tituana reviewed Student's records, interviewed Parent and Student, observed Student twice over two days, and had Student complete standardized tests of cognitive development and auditory processing skills. Dr. Tituana also had Parent, Student and two of Student's teachers complete questionnaires for rating Student's social emotional development, attention, and executive functioning.

Parent reported Student lacked self-control and suggested Student might need a one-to-one aide with him in challenging classes. Student reported being happy at home and not needing help with homework. Student's favorite and easiest class was history, but he stated that none of his classes were challenging at that time. Student had a math goal and Dr. Tituana observed Student during his math class. Student was occasionally inattentive or off task, but either self-corrected or was easily redirected by his teacher.

Tituana administered a standardized test of cognitive development, and Student scored in the average range in all categories of cognitive ability. In tests of auditory processing skills, Student earned average scores on all tests.

Ernesto Moreno, Student's eight grade special education teacher for Tutorial during the 2022-2023 school year, administered the academic achievement portion of the psychoeducational assessment. Student scored in the average range in all categories, with only one score in the low average range.

On rating scales of social emotional development, Student reported clinically significant concerns in attitude towards teachers, but upon questioning by Dr. Tituana during the evaluation process, Student explained he did not feel the questions had sufficient context for him to accurately respond, particularly because he had multiple teachers with varying class expectations. Student emphasized to Dr. Tituana that he was putting extra effort into his schoolwork and study habits, and his grades were better than they had ever been. Parent did not rate any areas of clinically significant concern, but rated Student at risk for attention problems.

Social emotional rating scales were also completed by Student's general education math teacher for the 2022-2023 school year, Bianca Mar-Elia, and Moreno. Mar-Elia reported no behavioral or emotional concerns for Student. She rated Student with clinically significant concern for hyperactivity, such as being restless, overactive, or impulsive, and at risk for attention problems. Moreno reported Student was impulsive with verbal outbursts, but Student had worked on catching himself before making an outburst and the behavior had greatly decreased. Moreno had no clinically significant

concerns about Student, but rated Student at risk for hyperactivity and social skills, such as difficulty complimenting others and making suggestions for improvement in a tactful and socially acceptable manner.

On rating scales of attention and executive functioning, Student's attention and executive functioning were overwhelmingly in the average range for each responder. Student rated his self-regulatory abilities and cognitive executive functioning as comparable to that of his peers. Moreno rated Student as exhibiting appropriate self-regulatory abilities and executive functioning. Mar-Elia rated Student as exhibiting moderate difficulties with sustained attention and working memory, and mild difficulty with impulsivity and hyperactivity. Parent rated Student as having, in the home environment, moderate difficulty with sustained attention and working memory, and clinically significant difficulty with impulsivity, or the ability to control impulses and stop his own behavior at the proper time.

Dr. Tituana concluded Student exhibited mild difficulty with sustained attention and executive functioning skills due to his ADHD, but that his educational performance was no longer adversely impacted as evidenced by overwhelmingly average scores on the rating scales and observations in the classroom and during testing. Because his ADHD did not adversely affect Student's educational performance, Student did not meet the eligibility criteria for other health impairment.

Behaviorist Kim Hamby prepared a progress report in October 2022 on how consultations between a board-certified behavior analyst and Student's teachers impacted Student's performance in the classroom. Hamby was a well-qualified school behaviorist with a master's degree in psychology and 32 years of conducting behavior assessments on middle school children with maladaptive behaviors. Hamby collected

data on Student's progress on his annual goal to engage in appropriate interactions with staff and peers. Appropriate interactions were defined as

- engaging in positive communication,
- using an appropriate tone and volume in class,
- engaging in cooperative social play,
- abstaining from physical and verbal disputes, and
- maintaining physical boundaries.

Student's annual goal was to act appropriately in eight out of nine opportunities as evidenced by observation, data collection, and staff and self-report. The goal's baseline from the October 14, 2021 IEP referenced Student's discipline incidents for horseplay, and past discipline for hostile behavior towards peers and defiance. The 2021 baseline also reported Student was on-task and well behaved during academic tasks but struggled during unstructured passing periods and with talking to peers and being loud during class.

Hamby observed Student in multiple classes. Hamby took data every 15 seconds on Student's behavior compared to his peers. Hamby observed Student in Moreno's Tutorial class on August 24, 2022, in science class with general education teacher Nicholas Crivelli on September 12, 2022, and in technology and computer class with general education teacher William Marson on September 29, 2022. Student participated well in all classes, asked for help when needed, and assisted others. Student's interactions with peers were appropriate in nine of 10 opportunities. Student could be impulsive, silly, and loud on occasion, but was easily redirected. Student's teachers reported that he was getting good grades and they were not seeing any significant behaviors that interfered with Student's learning or the learning of others.

Hamby observed Student on campus during unstructured time and on the playground. Student did not display any excessive behavior beyond what others were doing. Hamby did not take data on these observations or include them in her progress report. However, by October 2022 there were no reports that Student engaged in hostile behavior towards peers or defiance, in the classroom or during unstructured periods. None of Student's eighth grade teachers or service providers had heard of Student engaging in any fights, verbal or physical, with peers or teachers. None of them had seen or heard of Student displaying defiance to peers or teachers, during class or unstructured time. No assertive discipline records for the 2021-2022 or 2022-2023 school years were offered into evidence to indicate Student engaged in excessive horseplay, was hostile towards peers, or was defiant during passing periods or on the playground. School counselor Antis testified that Student had internalized strategies for engaging in appropriate interaction and maintaining good self-esteem, and by October 2022 was no longer emotionally dysregulated. The evidence did not show Student engaged in any inappropriate behavior during passing periods, on the playground, or at any other unstructured times outside of the classroom, or that his behavior during unstructured time adversely affected his learning or that of others.

Hamby concluded Student responded well to school and classroom positive behavior intervention supports using Tier 1 and Tier 2 strategies. Turlock's Tier 1 and Tier 2 supports were general education supports available to all students, and Tier 3 supports were individualized special education supports. Tier 1 included school-wide rules for behavior management and discipline. Tier 2 supports were classroom specific and included the teacher's classroom positive behavior intervention strategies, such as a token economy and rewards for good behavior. All of Student's IEP accommodations were in the Tier 1 or Tier 2 categories and could be provided without an IEP.

Turlock convened Student's three-year review IEP team meeting on October 6, 2022. Parent, Tutorial teacher Moreno, math teacher Mar-Elia, school counselor Antis, and an administrator attended the meeting. Parent wanted Student to drop Tutorial and be allowed to take a general education elective instead. Parent also requested that Student have a one-on-one aide in math.

Student's statewide assessment scores from spring 2022 were available to the October 2022 IEP team, and Student's scores had increased from below standards in spring 2021 to standards nearly met in spring 2022. Student's reading level on a standardized classroom test at the beginning of the 2022-2023 school year was very near grade level.

Moreno presented written input gathered from Student's eighth grade teachers before the October 6, 2022 IEP team meeting. They all indicated that after a rocky start to the school year, Student's behaviors were manageable with general education accommodations and classroom positive behavior systems. Student was earning good grades, completing classwork, and turning in homework within the time allowed by his IEP accommodations and classroom rules. Mar-Elia reported there was an aide in Student's math class who assisted all students, and Student did not need special education supports for her class. Student's teachers reported no gross or fine motor skill concerns at that time. Student's handwriting was bit sloppy, but legible.

The psychoeducational assessment and behavior progress report were not yet completed, so after the IEP team reviewed the present levels of performance and teacher reports, the October 6, 2022 IEP team meeting was continued to October 25, 2022.

The IEP team meeting was reconvened on October 25, 2022. Parent, Student, Moreno, Crivelli, Dr. Tituana, Hamby, school counselor Antis, and special education case manager Carla Briones attended that meeting.

Dr. Tituana summarized the results of the psychoeducational assessment report, specifically, that Student had average cognitive ability and processing skills. Student's social emotional functioning, attention, and executive functioning were generally in the average range compared to his peers, with concerns in hyperactivity, and mild to moderate difficulties with sustained attention and social skills. Parent told the team Student was very manageable at home. Moreno reported Student had average scores in all areas of academic testing. Student's grades at the end of the first quarter of the 2022-2023 school year were all A's, except for a B in math and a C in integrated technology. Dr. Tituana told the team Student did not meet the criteria for other health impairment because although he had ADHD, it did not adversely affect his education so that he needed special education and related services.

Hamby presented the behavioral intervention services progress report. Hamby reported that Student acted appropriately 94 percent of the time in unstructured activities, and 96 percent of the time in the classroom, and had made a lot of progress since October 2021. Hamby recommended that monthly teacher consultation with a behaviorist be discontinued because Student was not engaging in behaviors that impacted his ability to access the curriculum and participate in his education.

Turlock gave Parent copies of both the psychoeducational assessment report and the behavior intervention services progress report at the October 25, 2022 IEP team meeting.



Student's school counselor Antis shared that it was her second year of working with Student. Student had needed some time to adjust to the new school year but was no longer emotionally dysregulated and Student's teachers reported to her in October 2022 that Student was doing great. Student was independently using strategies to regulate his emotions, communicating well with teachers, and no longer disruptive in his classes.

Student met his two social emotional goals to engage in appropriate social interactions, and to identify and express positive feelings and strengths to increase confidence and self-esteem. Antis testified credibly and convincingly at hearing that she was hard pressed to think of a social emotional goal for Student by October 25, 2022, because Student no longer needed mental health supports.

Student met his math goal, and Mar-Elia reported Student was doing well in math. Moreno regularly spoke with all of Student's teachers, as his Tutorial class was intended to provide specialized academic instruction to help students understand the curriculum. Student came to Tutorial class well-prepared, completed assignments with little to no help, and was reported to be earning good grades in all of his classes. Student had not met his organization goal to get daily signatures on a homework assignment summary sheet from Parent. However, both Student's seventh grade teachers for the 2021-2022 school year had reported to Ferreira, and eighth grade teachers for the 2022-2023 school year reported to Moreno, that Student was successfully completing his work or making it up within the extra time allowed by class rules and IEP accommodations. The October 25, 2022 IEP team discussed that the purpose of the goal had been achieved, and that Student no longer needed an organization goal, although he still needed general education accommodations like extra time, preferential seating, and positive redirection.

The IEP team determined Student did not meet eligibility criteria for other health impairment, or for specific learning disability as will be discussed at Issue 2b. Special education teacher Moreno and case manager Briones explained to Parent and all team members that Student's failure to be found eligible for special education meant that Student would no longer have an IEP. Parent requested the October 25, 2022 IEP team refer Student for a 504 plan to retain Student's general education accommodations, and signed consent to the IEP exiting Student from special education that same day.

The evidence established Student was not eligible for special education as a child with other health impairment. Student had an ADHD diagnosis, and unquestionably exhibited the symptoms of that disability in his impulsiveness, distractibility, and occasional inattention. However, by October 25, 2022, Student's behaviors were very close to a typical eighth grader and managed with redirection from his teachers and with school and classroom behavior intervention programs and strategies. Student had learned to regulate his emotions, to check his impulsiveness, and to have confidence in himself without acting out in class. The interference of ADHD in Student's education was minimal, and his disability no longer had a significant adverse effect on his learning or the learning of others.

Even had Student's ADHD adversely affected his educational performance, Student did not prove that the degree of impairment required specially designed instruction that could not be provided by modification of the regular school program or through the resources of the regular education program. (20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.8(a)(1); Ed. Code, §§ 56026, subds. (a) and (b), 56303.) Student no longer needed specialized academic instruction in a Tutorial class. He was earning average grades, with A's in most classes, and self-reported that he was not challenged in any of his classes because he was putting more effort into his schoolwork and study habits.

Parent acknowledged Student no longer needed Tutorial and Parent had requested since Student was in seventh grade that he drop Tutorial. Student was completing and turning in homework, sometimes with extra time as an accommodation or because a teacher permitted late work to be turned in. Student needed Tier 1 and Tier 2 accommodations available to any general education student, but no longer needed specialized instruction or special education services to access his education.

Student contends the determination that Student was ineligible for special education under other health impairment was in error because the information presented by Dr. Tituana on Student's social, emotional, and behavioral functioning to the October 25, 2022 IEP team was inaccurate. Parent lied in the Parent interview and on rating scales questionnaires to characterize Student as out of control at home. Parent explained at hearing that she lied to skew the results to better support her intention to request a one-to-one aide for Student. However, despite Parent's attempts, her reports of Student's social, emotional, and behavioral function were consistent with the teachers' responses and did not skew the results. The results of the psychoeducational assessment were accurate and valid.

Parent's report and rating scales did not, in fact, demonstrate Student needed one-to-one aide support for behavior, as will be discussed at Issue 3a. But Parent's willingness to lie to achieve a desired end adversely affected her credibility. *Falsus in uno, falsus in omnibus* is a common law principle, which means false in one thing, false in everything. The principle, initially codified in California Code of Civil Procedure section 2061, stands for the proposition that a witness who willfully falsifies one matter is not credible on any matter. (See *White v. Disher* (1885) 67 Cal. 402, 7 P. 826; Judicial Council of California Civil Jury Instructions (2023) No. 107; see also Evid. Code, § 780.) Parent's intention to be untruthful to obtain the services she wanted undermined the

credibility of her testimony throughout the hearing. In addition, Parent's testimony about Student's behavior in October 2022 and her communications with teachers at that time was particularly vague, confusing, and evasive, which further undermined her testimony on those topics.

Student's expert, retired principal Abbe August Irshay, Ed.D., opined that Student had not met his social emotional goals as reported by Dr. Tituana to the October 25, 2022 IEP team. Dr. Irshay also opined the psychoeducational assessment was not appropriately performed making its results unreliable, and Student should not have been exited from special education. However, Dr. Irshay was not qualified or sufficiently prepared to render an informed opinion on any relevant topic. Although Turlock focused much of its cross-examination on Dr. Irshay's credibility, it was her lack of qualifications, not her truthfulness or potential bias, that undermined her opinions.

Dr. Irshay had a doctorate in educational leadership and 20 years of experience as a school administrator. She had a general education teaching credential in business and math, but was not a

- credentialed special education teacher,
- credentialed school psychologist,
- licensed mental health clinician, or
- board-certified behavior analyst.

Dr. Irshay had no education, training, or experience in teaching special education, psychology, mental health, or behavioral services to students with special needs.

Dr. Irshay's lack of education, training, and experience as a special education teacher, school psychologist, mental health counselor, or behaviorist rendered her opinions on the professional actions and opinions of Moreno, Dr. Tituana, Antis, or Hamby as being

of little to no weight. Dr. Irshay's willingness to form opinions on professional matters outside her expertise in the field of administration adversely affected her credibility and persuasiveness.

Dr. Irshay spoke with Parent but did not review Student's educational records beyond scanning a few IEPs. Dr. Irshay did not review the data on Student's behaviors, and did not observe Student in school, or speak with any of Student's teachers. Dr. Irshay purported to critique the psychoeducational assessment and Dr. Tituana's conclusions based on Irshay's years of experience assigning school psychologists to perform assessments and hearing psychoeducational reports presented at IEP team meetings. This is analogous to a hospital administrator without a degree in medicine opining about whether a doctor correctly ran tests on and diagnosed a patient. Dr. Irshay's opinion on the appropriateness, or the results, of the psychoeducational assessment were given little to no weight. Her opinions on Student's educational needs and the program components to meet those needs were poorly informed or not supported by the evidence, and also given little to no weight.

Dr. Irshay was critical of the progress reports on Student's annual goals as having typos and providing insufficient information on Student's progress. However, Student had the burden of proving that he met the criteria for other health impairment, and Dr. Irshay's testimony fell far short of establishing that the October 25, 2022 IEP team lacked sufficient information regarding Student's progress on goals, or that any of the information provided to the team was incorrect. The progress reports were not considered in isolation. The IEP team had a variety of information on Student's progress on goals not just from the progress reports, but Hamby's behavior intervention services progress report, the psychoeducational assessment, and teacher and service provider reports.

Dr. Irshay opined that as a matter of principle she would not recommend exiting Student from special education at the beginning of eighth grade because Student might need special education support when he transitioned to high school in ninth grade. This opinion was illogical, contrary to the law, and persuasively debunked by Turlock's credentialed and licensed teachers and service providers. All of Student's teachers, service providers, and assessors unanimously and persuasively opined that once Student no longer needed special education or related services, it was appropriate to exit him from special education.

Mental health clinician and school counselor Antis persuasively and articulately explained that if Student needed support in high school, new assessments could be requested and performed on Student's functioning in that new environment. Then, an IEP team could be convened to determine if Student needed special education and supports in high school. Providing special education and related services to a student who does not need them does not serve the student, wastes valuable school resources, and is not an obligation imposed on school districts by the IDEA or California special education law.

Student did not require special education because of his ADHD and did not qualify for special education as a student with other health impairment. Student did not meet Student's burden of proving by a preponderance of the evidence that Turlock denied him a FAPE during the 2022-2023 school year by failing to find him eligible for special education under other health impairment.

## ISSUE 2b: STUDENT WAS NOT ELIGIBLE FOR SPECIAL EDUCATION IN THE CATEGORY OF SPECIFIC LEARNING DISABILITY

A student has a specific learning disability if he or she has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to

- listen,
- think,
- speak,
- read,
- write,
- spell, or
- perform mathematical calculations. (Ed. Code, § 56337, subd. (a).)

Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).)

A school district may determine whether a student has a specific learning disability by taking into consideration whether the student has a severe discrepancy between achievement and intellectual ability in

- oral expression,
- listening comprehension,
- written expression,
- basic reading skill,
- reading comprehension,

- mathematical calculation, or
- mathematical reasoning. (Ed. Code, § 56337, subd. (b) (emphasis added).)

The decision as to whether a severe discrepancy exists must account for all relevant material which is available on the student, and no single score or product of scores, test or procedure may be used as the sole criterion for the decisions of the IEP team as to the student's eligibility for special education. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).)

When standardized tests are valid for a specific student, a severe discrepancy is shown by measuring mathematical differences between ability and achievement scores on standardized testing. (*Id.* at subd. (b)(10)(B)(1).) California regulations provide a formula for determining a severe discrepancy:

When standardized tests are considered to be valid for a specific pupil, a severe discrepancy is demonstrated by: first, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the ability test score to be compared; second, computing the difference between these common standard scores; and third, comparing this computed difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests. A computed difference which equals or exceeds this standard criterion, adjusted by one standard error of measurement, the adjustment not to exceed 4 common standard score point, indicates a



severe discrepancy when such discrepancy is corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples as appropriate. (*Ibid.*)

A student with a disability in a basic psychological process and a discrepancy between cognitive ability and academic achievement, must also demonstrate that the degree of impairment requires special education. (20 U.S.C. § 1401(3)(A); Cal. Code Regs., tit. 5, § 3030, subd. (a); *M.P. v. Santa Monica Malibu Unified School Dist.* (C.D.Cal. 2008) 633 F.Supp.2d 1089, 1103.)

Turlock used the severe discrepancy model to determine if students had a specific learning disability. The testimony of Dr. Tituana and Moreno conclusively established that there was no computed difference between Student's cognitive ability and academic achievement that equaled or exceeded the standard criterion when adjusted as required. Student did not have a severe discrepancy under this model, particularly as no discrepancy was indicated by other tests, scales, instruments, observations, or work samples. Student's cognitive ability and academic achievement were in the average range in all areas of standardized testing, and in October 2022 Student was earning above average A and B grades in all classes except integrated technology, where he was earning a C, or average, grade.

Student also failed to prove an underlying processing deficit that manifested itself in the imperfect ability to

- listen,
- think,
- speak,

- read,
- write, spell, or
- perform mathematical calculations.

Although Student had a medical diagnosis of ADHD, Student scored in the average range in all domains of psychological processing. On rating scales of attention and executive functioning, Student was solidly average in all index scores excluding the elevated impulse control score based on Parent's false report. Student was a middle schooler who sometimes needed to be redirected to attend and complete his work, but he could

- listen,
- think,
- speak,
- read,
- write,
- spell, and
- perform mathematical calculations well.

Dr. Tituana explained persuasively at hearing that ADHD is a life-long disorder, but students can live with and learn how to manage this disorder. Particularly as to eligibility for specific learning disability, a deficit or weakness in psychological processing can be situational and no longer be present as a student matures and develops strategies for learning. In October 2022 Student no longer had processing deficits, with average processing scores in all areas.

No credentialed school psychologist was called to contradict Dr. Tituana's conclusion that Student lacked a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written that manifested in the imperfect ability to

- listen,
- think,
- speak,
- read,
- write,
- spell, or
- perform mathematical calculations.

Student did not call a credentialed school psychologist to contradict Dr. Tituana's opinion that Student did not have a severe discrepancy between his cognitive abilities and academic achievement. Dr. Tituana's conclusions and opinions were persuasive because they were well reasoned and supported by extensive corroborating evidence such as assessment results, report cards, teacher reports from October 2022, and the testimony of Student's eighth grade teachers and service providers.

As discussed above at Issue 2a, Student did not establish he required special education services in October 2022. Student was earning good grades, was focused, and behaving well in class with redirection and classroom-wide behavioral incentives and strategies. Student was no longer emotionally dysregulated. Tutorial teacher Moreno told the October 25, 2022 IEP team that Student no longer needed the specialized

academic instruction of the Tutorial class, behaviorist Hamby recommended discontinuing behavior consultation services, and school counselor Antis reported Student no longer needed counseling sessions for emotional regulation. The accommodations in Student's IEP were available through general education Tier 1 and Tier 2 supports, and a 504 plan. Student did not require special education or related services to receive those accommodations.

Antis told the October 25, 2022 IEP team that Student could continue receiving counseling support through a general education program in Turlock called CARES under a 504 plan. Antis also told Parent, administration, and other IEP team members that she would continue therapy sessions with Student for several weeks to slowly end the patient-therapist relationship. Antis explained at the IEP team meeting that those sessions would be part of her ethical obligation as a mental health clinician to transition Student to CARES or to no counseling, and would not include work on goals or other therapeutic purpose as a related special education service. Antis's proposed sessions for the sole purpose of ending the patient-therapist relationship were not evidence Student required special education and related services for mental health.

Student did not need special education or related services during the 2022-2023 school year after Turlock exited him from special education on October 25, 2022. Student earned straight A grades in all his classes in the third and fourth quarters of the 2022-2023 school year without special education or related services. Interestingly, at the time of hearing, Parent testified Student was doing well academically and behaviorally in ninth grade in high school for the 2023-2024 school year without special education and related services. Parent had no current intention to request Student be assessed for special education eligibility.

Student did not meet Student's burden of proving by a preponderance of the evidence that Turlock denied him a FAPE during the 2022-2023 school year by failing to find him eligible for special education and related services in the IEP developed on October 6 and 25, 2022, under specific learning disability.

### ISSUES 3a THROUGH 3d: DID THE OCTOBER 25, 2022 IEP DENY STUDENT A FAPE?

Student contends Turlock denied him a FAPE by failing to include a one-to-one aide, behavior intervention plan, extended school year, and parent training in behavior in the IEP developed on October 6 and 25, 2022. Turlock contends Student was no longer eligible for special education on October 25, 2022, and did not need any of those services to make educational progress.

This Decision finds that Student was not eligible for special education and related services as of October 25, 2022, and so he was not entitled to a FAPE on or after October 25, 2022. (See *R.B. ex rel F.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 942 [an ineligible student does not qualify for IDEA relief] (*R.B.*).) However, were Student eligible for special education on October 25, 2022, he nonetheless failed to prove that his specific claims as to the 2022-2023 school year denied him a FAPE, as analyzed below.

### ISSUE 3a: THE FAILURE TO OFFER A ONE-TO-ONE AIDE IN THE OCTOBER 25, 2022 IEP DID NOT DENY STUDENT A FAPE

Student argues that the content of the teacher reports prepared for the October 6, 2022 IEP team meeting establish Student had severe behaviors requiring

intensive behavioral intervention by a one-to-one aide. However, the early October 2022 teacher reports did not reference severe behaviors, and the comments alleged in Student's complaint were taken out of context.

The responses on the teacher reports Moreno collected before October 6, 2022, were generally favorable. Physical education teacher Pamela Tyler reported Student had good behavior. English language arts teacher Keli Youkhana reported Student behaved appropriately and was

- focused,
- responsible,
- engaged,
- motivated,
- completed homework,
- self-corrected, and
- worked independently.

History teacher Amy Olguin reported Student could be very disruptive by constantly talking and shouting out, although he was also respectful when redirected, followed directions, stayed on task, and worked independently. Olguin added that IEP accommodations were not enough, but Student's behaviors slowly improved when Olguin implemented her own behavior reminder system by putting three sticky notes on Student's desk and removing one at a time if Student acted inappropriately, and that system was working well. In technology, Student was impulsive, inconsistently followed directions, and was often on the verge of acting inappropriately. But Student consistently stayed on task and worked independently, and was improving his behavior so as not to lose class privileges. Student's math teacher, Bianca Mar-Elia, wrote

Student's behavior as 50-50, but getting better. Student followed directions, stayed on task, and worked independently, but had good days and bad days. Mar-Elia attended the October 6, 2022 IEP team meeting, and told the team that Student's behavior was much better than at the beginning of the year, and Student himself was asking not to do group work with certain friends in class because he knew he would talk with them and go off task.

At hearing, all of Student's teachers from the 2022-2023 school year testified credibly and persuasively that by October 25, 2022, and for the remainder of the school year, Student's behavior was typical of an eighth grader, and his infrequent mildly disruptive behaviors could be managed with general education accommodations such as seating away from distractions, positive redirection, and giving Student opportunities to step outside and reset. Although each teacher testified to slightly different classroom expectations and behavior reward systems, a common theme emerged that after a few weeks at the start of the school year, Student adjusted and his behaviors became minor to non-existent. Disruptive behaviors that infrequently occurred were manageable with regular classroom accommodations. Student's behavior did not affect grades in any of his classes.

Each of Student's teachers for the 2022-2023 school year was a highly qualified and experienced middle school teacher and testified with a professional demeanor. Most enjoyed having Student in their class and used anecdotes about Student to illustrate and explain their testimony and opinions. Each of Student's teachers answered questions readily and in detail and had good recall of Student and his conduct in the classroom. Their opinions were well reasoned and very persuasive regarding Student's educational needs and the program to meet those educational needs, and they unanimously testified that Student did not need a one-to-one behavior aide to do well in their classes. Physical

education teacher Tyler testified that Student's behavior was typical, and bluntly commented if Student needed a one-to-one aide, so did 500 children at the middle school.

History teacher Olguin noted that Student had straight A's in her class throughout the 2022-2023 school year, and the grades only appeared lower when reported at a time that homework was late, as permitted in her class, and not yet recorded in her gradebook. Math teacher Mar-Elia testified that as the 2022-2023 school year progressed, Student's behavior improved dramatically. He no longer delayed in completing work and responded well to redirection, and he no longer behaved in a way that interfered with Student getting his work done. Moreno testified that Student enjoyed Tutorial and could be boisterous by calling out answers, laughing loudly, and making comments to make other students laugh, but after a few weeks of implementing the accommodations in the IEP at the beginning of the 2022-2023 school year, Student's behaviors improved. The Tutorial class supported Student's other classes, and Moreno corroborated the other teachers' testimony by confirming that they had told him in October 2022 that Student's behavior was easily manageable. Student received a few 15-minute lunch detentions at the beginning of the school year for minor incidents, such as eating food in class, but that was rare.

At hearing, Student's science teacher Nicholas Crivelli was the most critical of Student, characterizing Student's behaviors as becoming more disruptive after the winter break. He speculated Student pushed back on class rules after a meeting between Parent, teachers, and school administrators in January 2023, where Parent demanded, and the principal agreed, that Student would not be given detentions for inappropriate behavior. However, Crivelli testified that through October 2022, Student's behavior was good, class ran smoothly, and Crivelli asked Student to refocus only about



three or four times each week. Even after January 2023, although Student's behaviors in Crivelli's classroom increased, he managed Student's behavior with class structure, redirection, and the classroom positive behavior reward system. Student earned good grades in Crivelli's class and had a strong science foundation for going into ninth grade science.

At hearing, Student's attorney questioned Crivelli about a classroom incident, but the testimony did not support the claim that Student required a one-on-one aide due to disruptive behavior. Sometime before October 25, 2022, Student pulled a pack of tissues out of his backpack and started talking to classmates and distracting them. When Crivelli asked Student to put the tissues away and focus, Student protested loudly that the tissues were only "boogie wipes," which made the entire class laugh. Crivelli could not recall what happened after that, but convincingly testified that Student was easily redirected. Crivelli attended the October 25, 2022 IEP team meeting, and reported to the team that Student had an A-minus in science, and although Student occasionally tested class rules, Student behaved well after Crivelli moved Student's seat away from talkative classmates. Crivelli also opined that Student did not need a one-to-one aide in his classroom for behavior.

Student did not need a one-to-one aide to prevent verbal or physical fights. Under questioning, none of Student's teachers had ever seen Student belligerent or in a fight with a peer or adult. Moreno vaguely recalled possibly hearing that Student had been in a pushing incident with another student during a passing period, but could not recall when, or if Student was disciplined. Student did not call anyone familiar with such an incident. No discipline record was offered into evidence that showed Student was

disciplined for verbal or physical fights in seventh or eighth grade. There was no persuasive evidence Student had been in any verbal or physical fight during the 2022-2023 school year.

Parent testified Student was very unhappy with his interactions with Olguin, Mar-Elia, and Crivelli, but that testimony was hearsay and vague. Parent's characterizations of Student's feelings appeared exaggerated and calculated to falsely suggest that Student had been out of control in classes with those teachers, despite overwhelming contrary evidence. Student rated his own social, emotional, and behavioral functioning in October 2022 as typical compared to peers. Teachers and school counselor Antis opined persuasively that after the first few weeks of the 2022-2023 school year, Student communicated well, advocated for himself, and was a happy, focused, and well-behaved Student. Parent demanded more communication from teachers at the October 6 and 25, 2022 IEP team meetings, and afterwards some of Student's teachers took the opportunity to call Parent and report when Student seemed to have a bad day. These reports did not indicate that Student engaged in behaviors that were not manageable by the teacher using IEP accommodations and classroom strategies. In sum, there was no evidence of Student needing a one-on-one aide to intervene for him with teachers at the time of the October 25, 2022 IEP or at any time during the 2022-2023 school year.

Student contends he needed a one-to-one behavior aide at home. However, Parent testified Student was well-behaved at home, with manageable bouts of hyperactivity and inattention. There was absolutely no evidence that Student needed a one-on-one aide at home, for any reason, at any time, let alone to access his education at the time of the October 25, 2022 IEP.

Student did not meet Student's burden of proving by a preponderance of the evidence that Turlock denied Student a FAPE during the 2022-2023 school year by failing to offer sufficient intensive individual services in the form of a one-to-one aide in the IEP developed on October 6 and 25, 2022. Turlock prevailed on Issue 3a.

### ISSUE 3b: THE FAILURE TO OFFER A BEHAVIOR INTERVENTION PLAN IN THE OCTOBER 25, 2022 IEP DID NOT DENY STUDENT A FAPE

Student contends he required a behavior intervention plan because Student was impulsive, silly, and loud on occasion, and because the October 25, 2022 IEP stated that Student's ADHD affected his ability to remain focused. Turlock contends Student was generally a good student, and his minor and infrequent disruptions were manageable with general education behavior interventions such as redirection and classroom reward systems.

As discussed at Issue 3a, Student lacked focus and was disruptive at the beginning of the 2022-2023 school year, but by October 25, 2022 was focused, completed classwork, and no longer had significant outbursts that could not be addressed with general education accommodations and class positive behavior reward systems. The weight of the evidence did not establish that the failure to offer a behavior intervention plan in the October 25, 2022 IEP resulted in Student's behaviors interfering with Student's learning or that of others.

Crivelli testified Student's behavior became more disruptive in the second half of the school year after Turlock exited Student from special education, but all Student's other teachers for the 2022-2023 school year testified Student's behaviors improved

throughout the 2022-2023 school year. Crivelli stated Student could be occasionally loud and inattentive throughout the 2022-2023 school year, but also admitted that these behaviors were manageable with Tier 1 and Tier 2 supports.

Technology and computer sciences teacher Marson had a class reward system that gave points for good behavior and took points away if a student did not respond to redirection the first time. Student's computer aptitude was good, and Student completed projects and appeared to enjoy the class. Student regularly had points removed for attempting to wear his hoodie in class or for slouching without regard for classroom rules to practice good ergonomics, but not for disrupting class. Student was sometimes loud and liked to talk to classmates, but responded promptly to redirection and was easily refocused. Marson adopted Olguin's three sticky notes behavior reminders for Student, and Student responded well.

Sometime after the October 25, 2022 IEP team meeting, Parent spoke to Marson by telephone to complain after Marson gave Student and some classmates a 15-minute lunch detention for misbehaving when a substitute teacher taught the class. Parent initially complained that Marson had not informed the substitute teacher that Student needed accommodations. Then, when Marson explained that he had given the substitute teacher a list of students who might need redirection to quiet down and focus, Parent accused Marson of putting a target on Student's back. Marson also gave Student detentions after Student was exited from special education in October 2022 for passing around food in class and not charging his laptop as directed the night before statewide testing. However, Student was generally well-behaved and earned an A in technology by the end of the year. Student did not turn in late work, go outside to rest, or need to be given preferential seating or other accommodations to succeed in

Marson's technology class. Student was like many middle schoolers in acting before thinking, and like many students needed reminders to stay on task when on a computer for an entire class period.

Student's behavior was manageable without goals, behavior intervention services, or other related services after Turlock exited Student from special education on October 25, 2022. For the remainder of eighth grade, Student's teachers implemented general education Tier 1 and Tier 2 accommodations. Those accommodations were sufficient to address Student's infrequent and mildly inappropriate behaviors during the 2022-2023 school year, and he no longer interfered with the learning of himself or others. Accordingly, this was corroborative evidence that Student did not need a behavior intervention plan as of October 25, 2022.

Student did not meet Student's burden of proving by a preponderance of the evidence that Turlock denied Student a FAPE during the 2022-2023 school year by failing to offer a behavior intervention plan in the IEP developed on October 6 and 25, 2022. Turlock prevailed on Issue 3b.

### ISSUE 3c: THE FAILURE TO OFFER EXTENDED SCHOOL YEAR IN THE OCTOBER 25, 2022 IEP DID NOT DENY STUDENT A FAPE

Student alleges he was behind in all academic subjects in October 2022 and was prone to, or had ample potential for, regression in behavior. Student contends the October 25, 2022 IEP should have offered extended school year services for summer 2023. Turlock contends Student did not display academic or behavioral regression and did not need extended school year services.

California special education regulations require that extended school year services be provided for each student with exceptional needs who requires special education and related services in excess of the regular academic year. (Cal. Code Regs., tit. 5, § 3043.) A student needs extended programming if their disability is likely to continue indefinitely or for a prolonged period, and interruption of their educational programming may cause regression, rendering it impossible or unlikely that they will attain the level of self-sufficiency and independence that would otherwise be expected in view of their disabling condition. (*Ibid.*) That is, the purpose of extended school year is to prevent regression and recoupment difficulties caused by the break from instruction over the summer.

Every witness questioned about Student's academic skills, including Parent, responded that Student was always good at academics. Student was performing at grade level and earning good grades throughout the 2022-2023 school year, and that evidence outweighed a few discrepant measures, such as Student's spring 2022 statewide test scores placing him at just below standards in English language arts and math. Student had an A grade in English language arts on October 25, 2022. Student met his math goal, had earned an above-average B grade in math, and Mar-Elia opined that Student's math skills were at grade level at the time of the October 25, 2022 IEP team meeting. On academic achievement testing as part of the October 2022 psychoeducational assessment, Student earned scores in the average range in all academic categories. There was no evidence Student had regressed in academic skills over summer 2022 and should have been offered extended school year services for summer 2023 for academics in the October 25, 2022 IEP.

Similarly, although Student had a rocky start in his first weeks of eight grade, his impulsivity and inattention were easily manageable and redirected by October 25,

2022. If Student had forgotten the strategies taught to him in seventh grade for social, emotional, and behavioral regulation over summer 2022, he recouped those skills within a reasonable time. Student's eighth grade teachers testified consistently and convincingly that Student's behavior improved over the first six weeks of the 2022-2023 school year, and disruptions were minor, infrequent, and manageable with accommodations and classroom positive behavior reward systems. The evidence did not establish Student's behavior had significantly regressed over summer 2022 to the point that he had difficulty recouping social, emotional, and behavioral skills at the start of the 2022-2023 school year. A common thread in the testimony of Student's eighth grade teachers was that Student's behavior was typical of many eighth grade boys who needed time to settle in with new teachers and new classroom expectations.

Both Parent and school counselor Antis, who worked with Student in seventh and eighth grade, opined that Student's behavior had improved significantly from seventh to eighth grade. A few weeks of adjustment at the beginning of the 2022-2023 school year did not establish that Student regressed in behavior or did not recoup taught behavior strategies within an appropriate time. The overwhelming preponderance of the evidence established Student did not need an offer of extended school year services for summer 2023 in the October 25, 2022 IEP.

Student did not meet Student's burden of proving by a preponderance of the evidence that Turlock denied him a FAPE during the 2022-2023 school year by failing to offer extended school year in the IEP developed on October 6 and 25, 2022. Turlock prevailed on Issue 3c.

### ISSUE 3d: THE FAILIURE TO OFFER PARENT TRAINING IN THE OCTOBER 25, 2022 IEP DID NOT DENY STUDENT A FAPE

Student contends the October 25, 2022 IEP should have offered parent training in behavior because he did not meet his October 2021 IEP organization and behavior goals and had behavior problems. Turlock contends Student was not entitled to parent training because it was not necessary for Student to access his education.

Student's complaint cites title 34 Code of Federal Regulations section 300.34(c)(8), as regulating parent training. However, that section is nothing more than a definition of parent training. It does not obligate a school district to offer parent training.

As with other related services, districts are responsible for providing parent counseling and training when the child's IEP team determines that it is necessary for the child to receive FAPE. (U.S. Dept. of Education, *Assistance to States for the Education of Children with Disabilities, and Preschool Grants for Children with Disabilities* (71 Fed. Reg. 46573, Aug. 14, 2006).) To determine whether services for a child's parents, such as training or counseling, should be included in a child's IEP, the team developing the IEP must determine that the service is needed for the child to receive an appropriate special education or other required related services in the least restrictive environment. (*Letter to Dole*, Office of Special Education and Rehabilitative Services (OSERS), July 25, 1986, at p. 2.) Any related services provided for parents must assist the child in developing skills needed to benefit from special education or correct conditions which interfere with the child's progress toward the goals and objectives listed in the IEP. (*Ibid.*)

Student argues he did not meet the organizational goal to get a daily signature from Parent on a homework sheet to ensure Student knew what homework was due and



completed it, and therefore Parents should have been offered parent training to assist Student. However, as Antis explained, Student refused to cooperate in getting daily parent signatures, but instead timely completed all homework. Student's eighth grade teachers testified consistently and convincingly that by October 25, 2022, Student came to class prepared, completed in-class assignments with minimal need for redirection, and turned in his homework assignments within the time allowed by classroom rules or under the accommodations of Student's IEP. Although Student did not meet the goal as written, he met the purpose of the goal, which was to teach Student organizational and executive functioning skills and motivate him to meet classroom expectations regarding homework completion. Student met classroom expectations without the need for Parents to be trained to assist Student in developing organization and executive functioning skills.

Student had two social emotional goals that addressed behavior in the October 14, 2021 IEP, and Student met both goals. By October 25, 2022, Student was appropriately engaged with adults and peers, and demonstrated confidence and good self-esteem. Student was no longer emotionally dysregulated, and had no identified areas of social, emotional, or behavioral need which required goals. Hamby found that Student was on-task 94 to 97 percent of the time in his classes and recommended that behavior services be discontinued. Student did not call a licensed mental health counselor or certified behaviorist to contradict the conclusions or opinions of Antis and Hamby. The October 25, 2022 IEP did not need to offer Parents training in behavior to assist Student in regulating his behavior.

Further, Parents did not need parent training in behavior to manage Student's behavior in the home. Parent told the October 6, 2022 IEP team that Student had no behavior problems at home and testified that she understood best how to work with

Student. Parent did not request parent training at the October 25, 2022 IEP team meeting. At hearing, Parent could not articulate what type of training Parents wanted, or why they needed it at the time of the October 25, 2022 IEP team meeting. Parent admitted she had lied about Student's behavior in responding to rating scales in October 2022, and conceded on cross examination that Student did not have inappropriate behaviors at home during eighth grade.

Student did not meet Student's burden of proving by a preponderance of the evidence that Turlock denied him a FAPE during the 2022-2023 school year by not offering parent training in behavior in the IEP developed on October 6 and 25, 2022. Turlock prevailed on Issue 3d.

#### ISSUE 4: SHOULD TURLOCK HAVE OFFERED TO ASSESS STUDENT FOR OCCUPATIONAL THERAPY AT THE OCTOBER 25, 2022 IEP TEAM MEETING?

Student contends he should have been assessed for fine motor deficits that required occupational therapy at the time of the October 6 and 25, 2022 IEP team meetings because he could not read or write cursive in October 2022, and had sloppy handwriting. Turlock contends reading and writing cursive were not California state standards, and Student did not need occupational therapy to access his education.

Occupational therapy is a related service designed to improve a student's fine motor, coordination, and sensory processing skills. Special education and related services may include occupational therapy when appropriate. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363.)

A disability is suspected, and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may

have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21 (*Timothy O.*); *Dept. of Educ., State of Hawaii v. Cari Rae S.* (D.C.Hawaii 2001) 158 F.Supp. 2d 1190, 1194.) That notice may come in the form of concerns expressed by parents about a child's symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child's behavior. (*Timothy O., supra*, 822 F.3d at 1119-1120 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].)

Once a child qualifies for special education, a school district must reassess a child if it determines that the educational or related service needs of the child, including improved academic achievement, and functional performance of the child warrant a reevaluation, or if the student's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a)(1).)

Neither Parent, nor any of Student's teachers, requested an occupational therapy assessment at the October 6 or 25, 2022 IEP team meetings. Reading and writing cursive were not California educational standards, and Turlock had no obligation to teach those skills to Student, let alone offer related services to support such instruction. Student's teachers testified credibly that Student did not need to read or write cursive as part of the general education curriculum, or to access their class curriculum. Student did not need the ability to read or write cursive to improve academic achievement or functional performance.

Student did not prove Turlock had notice of a suspected or actual fine motor skill deficit warranting an occupational therapy assessment as of the October 2022 IEP team meetings. Student's present levels of performance in the October 6, 2022 IEP stated

Student's handwriting could be sloppy at times but was legible to unfamiliar readers. It also stated Student used classroom tools such as writing instruments, scissors, and erasers without difficulty, and was proficient with a computer keyboard and mouse. All witnesses, including Parent, testified consistently that Student was a good athlete, and could catch, throw, and compete in other sports requiring fine motor skills and eye hand coordination. Turlock had no reason to suspect Student had fine motor deficits or needed to assess Student for a suspected disability in this area.

Student failed to meet Student's burden of proving by a preponderance of the evidence that Turlock denied him a FAPE during the 2022-2023 school year by failing to offer an occupational therapy assessment at the October 6 or October 25, 2022 IEP team meetings. Turlock prevailed on Issue 4.

#### ISSUE 5: DID TURLOCK DENY STUDENT A FAPE IN THE OCTOBER 25, 2022 IEP BY FAILING TO ADDRESS STUDENT'S REGRESSION IN BEHAVIOR?

Student contends he was denied a FAPE during the 2022-2023 school year because the IEP developed on October 6 and 25, 2022, did not address Student's alleged regression in behavior. Turlock contends Student's behavior improved by October 25, 2022, to the point it could be addressed with general education accommodations, and Student did not need special education or related services to manage his behavior.

Student's complaint alleges Student was prone to regression in behavior because he responded impulsively and became silly and loud. At hearing, Student relied on teacher reports collected by Moreno for the October 6, 2022 IEP team meeting to establish that Student was constantly talking in class, was disruptive, and regressed in

his behavior. However, those reports indicated that Student had adjusted to their classroom routines after a few weeks in the beginning of the 2022-2023 school year, and Student was only engaging in minor and occasional distractive behavior by October 6, 2022.

Student was loud and blurted out in class at the beginning of the 2022-2023 school year, but promptly recouped the strategies and positive self-perception that he had learned with Antis while working on his social emotional goals. Student was responding to accommodations and class positive behavior rewards by October 6, 2022. As discussed at Issues 3a and 3b, if Student was disruptive or inattentive, he could be easily redirected. By October 25, 2022, Student's blurting out in class, talking with peers in class, and lack of focus or maintaining a task were effectively managed with Tier 1 and Tier 2 general education supports, and his conduct did not interfere with his learning or the learning of others. The evidence did not establish that Student's behavior regressed between the end of seventh grade and the October 25, 2022 IEP.

Student did not meet Student's burden of proving by a preponderance of the evidence that Turlock denied him a FAPE during the 2022-2023 school year by not addressing a regression in Student's behavior in the IEP developed on October 6 and 25, 2022. Turlock prevailed on Issue 5.

#### ISSUES 6a AND 6b: DID TURLOCK DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR BY INTERFERING WITH PARENTS' PARTICIPATION IN THE OCTOBER 2022 IEP TEAM MEETINGS?

Student contends he was denied a FAPE because Turlock significantly interfered with Parents' participation in the October 6 and 25, 2022 IEP team meetings by not

offering goals in academics, organization, and behavior, and by failing to grant Parents' requests for a one-to-one aide and parent-teacher communication. Turlock contends Parent meaningfully participated in the IEP team meetings by expressing her concerns and discussing them with the IEP team.

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036 [a parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

#### ISSUE 6a: THE FAILIURE TO OFFER NEW GOALS IN ACADEMICS, ORGANIZATION, AND BEHAVIOR DID NOT INTERFERE WITH PARENT'S PARTICIPATION RIGHTS

Student did not need a goal in academics in October 2022. Student ended his seventh grade year with average to above average grades. Seventh grade teachers Ferreira and Gonzales testified Student was strong academically. Math teacher Gonzales explained that Student received an F in the third quarter of the 2021-2022 school year, but geometry in the third quarter was very difficult for most students, and Student pulled his grade up to an above average B by the end of the school year. In eighth grade, in the first quarter of the 2022-2023 school year, Student still performed at

grade level, earning A's, one B and one C, and scored in the average range in all areas of academic achievement in the fall 2022 psychoeducational assessment. Average cognitive processing scores established that Student's ADHD was no longer interfering with Student's ability to learn and understand math, or any other academic area. In October 2022, Student did not have academic needs that required a goal and special education or related services support.

Student did not need an organization goal in October 2022. Ferreira and Gonzales testified that Student developed good work habits in seventh grade. Student's eighth grade teachers reported to the October 6, 2022 IEP team that Student's work habits were good. History teacher Olguin and English language arts teacher Youkhana each reported Student had good work habits and was earning an A grade, and was turning in homework in the time allowed. Student reported to Dr. Tituana for the psychoeducational assessment that he had good work habits and was studying hard and earning the best grades he ever had. In October 2022, Student did not have organizational needs that required a goal and special education or related services support.

By October 2022, Student was no longer engaged in inappropriate behavior that that could not be managed with Tier1 and Tier 2 general education accommodations and strategies. Student was easily redirected when he was inattentive, talking to peers in class, or loud, and his behavior no longer interfered with his learning or the learning of others. Student met his October 2021 IEP social emotional goals as of October 2022. Antis reported that Student was not emotionally dysregulated and no longer needed mental health services beyond those available to any general education student. In October 2022, Student did not have behavior needs that required special education and related services support.

Parent may not have participated in the development of goals at the October 6 and 25, 2022 IEP team meetings, as no goals were needed, but Parent did meaningfully participate in those meetings. Parent attended the IEP team meetings, and was informed of Student's present levels of performance, progress and assessment results, and that Student no longer needed special education and related services. Parent requested additional parent-teacher contact, and a one-to-one aide for Student's behaviors. When informed that Student no longer qualified for special education and related services, Parent requested a 504 plan to ensure Student continued to receive accommodations for his behavior. Accordingly, Turlock did not interfere with Parent's meaningful participation at the October 6 and 25, 2022 IEP team meetings by not developing goals for Student in academics, organization, or behavior.

Student failed to meet Student's burden of proving by a preponderance of the evidence that Turlock denied him a FAPE during the 2022-2023 school year by denying Parents meaningful participation in the October 6 and 25, 2022 IEP team meetings by failing to offer new goals in academics, organization, and behavior. Turlock prevailed on Issue 6a.

#### ISSUE 6b: THE FAILURE TO GRANT PARENT'S REQUESTS FOR A ONE-TO-ONE AIDE AND PARENT-TEACHER COMMUNICATIONS DID NOT INTERFERE WITH PARENT'S PARTICIPATION RIGHTS

Although the IDEA mandates parental participation in educational program decisions, it does not mandate the weight school districts should give the parent's educational preferences. (See 34 C.F.R. § 300.116(a)(1).) The Ninth Circuit has held that a parent does not have a veto power over any provision of the IEP. (*Vashon Island, supra*, 337 F.3d at p. 1131.)



Parent attended the October 6 and 25, 2022 IEP team meetings, and participated in the October 6 and 25, 2022 IEP team meetings in a meaningful way. Parent stated her concerns, and those concerns were discussed and considered by the IEP team. The fact that the October 25, 2022 IEP did not offer Parent the services she requested does not establish she was not given an opportunity to voice her concerns and requests, and that Turlock did not consider those concerns and requests.

Parent's primary concerns on October 6, 2022 were that she have more communication with teachers and staff, particularly regarding Student's behavior, that Student be permitted to drop Tutorial for an elective class, and that Student be assigned a one-to-one aide. The evidence established Parent had multiple conversations with teachers and staff throughout the 2021-2022 and 2022-2023 school years, and the team reasonably did not agree that Parent needed further communication. The team also agreed to discuss a replacement for Student's Tutorial class and whether Student needed a one-to-one aide at the continued IEP team meeting on October 25, 2022, after reviewing pending assessments. Turlock's IEP team members did not interfere with Parent's participation in the October 6, 2022 IEP team meeting with regard to Parent's requests at the October 6, 2022 IEP team meeting.

Parent's primary concern at the October 25, 2022 IEP team meeting was that Student be permitted to drop his Tutorial class and take an elective, and have a one-to-one aide to assist Student during his math class and other classes as needed. As discussed at Issues 2a, 3c, and 6a, Student was performing at grade level and his behaviors were manageable with general education accommodations. Turlock permitted Student to drop the Tutorial class he no longer needed for specialized academic instruction. As discussed at Issue 3a, Student did not require a one-to-one aide for academics or behavior, and the Turlock IEP team members declined to offer

Student a one-to-one aide. IEP team discussions primarily focused on Student's need for any special education and related services, including the need for a one-to-one aide. The fact that discussions focused on Student's ineligibility for special education and related services rather than Parent's request for a one-to-one aide does not change the fact that the IEP team appropriately considered Parent's requests. Turlock's IEP team members did not interfere with Parent's participation in the October 25, 2022 IEP team meeting.

Student argues that Turlock interfered with Parent's participation in the decisionmaking process because other IEP team members did not explain to Parent that a finding of ineligibility for special education meant Student no longer had an IEP. However, other than Parent's contradictory and unconvincing testimony that she did not understand the ramifications of Student's ineligibility, the evidence established Turlock's IEP team members explained ineligibility consequences and Parent understood them.

Turlock gave Parent a copy of the psychoeducational assessment and behavior intervention progress reports at the October 25, 2022 IEP team meeting, and Dr. Tituana and Hamby presented the reports at that meeting. Both assessors concluded Student no longer needed special education and related services, with supporting data and detailed explanations. Program manager Briones and school counselor Antis each testified persuasively that they explained to Parent in the October 25, 2022 IEP team meeting, that if Student was determined not eligible for special education he would no longer have an IEP or receive special education services. That was an objectively straightforward concept and easily understood.

Parent's testimony that she did not understand that Student would lose his special education instruction and any other benefits that would come with an IEP was

not credible. Multiple IEP team members from the October 25, 2022 IEP team meeting testified credibly and persuasively that Parent was actively involved in the discussions regarding eligibility, appeared to understand that Student would not have an IEP, and requested a 504 plan at the October 25, 2022 IEP team meeting in lieu of special education.

Student also argues Parent did not understand the consequences of Student's ineligibility for special education because Parent did not receive the entire IEP document before consenting to the October 25, 2022 IEP. Parent testified that on October 25, 2022, she electronically received from Turlock a blank page with a box for her signature without the entire October 25, 2022 IEP document attached, which she signed the same day. Parent's testimony was not credible or convincing on this point. Turlock stored IEP documents to be signed in a statewide electronic system called SEIS. Special education director Erica Tschantz was very familiar with SEIS and testified convincingly that only complete IEP documents can be generated for parent signature in SEIS. IEP documents cannot be sent from SEIS with less than all pages. Turlock sent Parent the October 25, 2022 IEP directly from SEIS on that same date, and it was not possible for Parent to sign the signature page without opening the entire IEP document.

Parent also testified repeatedly that she understood her rights under special education law, before, during, and after the October 25, 2022 IEP team meeting. Parent's protestations that she did not understand the consequences of consenting to the October 25, 2022 IEP were unconvincing and came across as a case of buyer's remorse more than a lack of understanding. At hearing, Parent also seemed confused as to why she wanted Student found eligible for special education in this due process matter, as she also stated she did not want Student reassessed or made eligible for special education now that Student was in high school.

Lastly, Student argues Turlock denied Parent's requests because Turlock's team members had predetermined that Student was ineligible for special education. Student presented no evidence that Student's eligibility for special education and related services was predetermined. None of the witnesses at hearing indicated they had discussed eligibility with other IEP team members prior to the October 25, 2022 IEP team meeting when the assessment results were reported. None of the Turlock IEP team members made a determination on their own before the October 25, 2022 IEP team meeting or without the participation of all IEP team members, including Parent. The Turlock IEP team members testified credibly and persuasively that they kept an open mind on Student's eligibility pending the discussion at the October 25, 2022 IEP team meeting.

Student did not meet Student's burden of proving by a preponderance of the evidence that Turlock denied Student a FAPE during the 2022-2023 school year by denying Parents meaningful participation in the IEP team meetings on October 6 and 25, 2022 by not granting Parent's requests for a one-to-one aide and better Parent-teacher communication. Turlock prevailed on Issue 6b.

## CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

#### ISSUE 1a:

Turlock did not deny Student a FAPE during the 2021-2022 school year, by failing to offer sufficient intensive individual services in the October 14, 2021 IEP in the form of a one-to-one aide.

Turlock prevailed on Issue 1a.

#### ISSUE 1b:

Turlock did not deny Student a FAPE during the 2021-2022 school year, by failing to offer a behavior intervention plan in the October 14, 2021 IEP.

Turlock prevailed on Issue 1b.

#### ISSUE 1c:

Turlock did not deny Student a FAPE during the 2021-2022 school year, by failing to offer parent training in behavior in the October 14, 2021 IEP.

Turlock prevailed on Issue 1c.

#### ISSUE 2a:

Turlock did not deny Student a FAPE during the 2022-2023 school year, by failing to find Student eligible for special education services in the IEP developed on October 6, and 25, 2022, under other health impairment.

Turlock prevailed on Issue 2a.

#### ISSUE 2b:

Turlock did not deny Student a FAPE during the 2022-2023 school year, by failing to find Student eligible for special education services in the IEP developed on October 6, and 25, 2022, under specific learning disability.

Turlock prevailed on Issue 2b.

#### ISSUE 3a:

Turlock did not deny Student a FAPE during the 2022-2023 school year, by failing to offer sufficient intensive individual services in the IEP developed on October 6 and 25, 2022, in the form of a one-to-one aide.

Turlock prevailed on Issue 3a.

#### ISSUE 3b:

Turlock did not deny Student a FAPE during the 2022-2023 school year, by failing to offer a behavior intervention plan in the IEP developed on October 6 and 25, 2022.

Turlock prevailed on Issue 3b.

#### ISSUE 3c:

Turlock did not deny Student a FAPE during the 2022-2023 school year, by failing to offer extended school year services in the IEP developed on October 6 and 25, 2022.

Turlock prevailed on Issue 3c.

### ISSUE 3d:

Turlock did not deny Student a FAPE during the 2022-2023 school year, by failing to offer parent training in behavior in the IEP developed on October 6 and 25, 2022.

Turlock prevailed on Issue 3d.

### ISSUE 4:

Turlock did not deny Student a FAPE during the 2022-2023 school year by failing to offer an assessment in occupational therapy at the October 6, and 25, 2022 IEP team meetings.

Turlock prevailed on Issue 4.

### ISSUE 5

Turlock did not deny Student a FAPE during the 2022-2023 school year, by failing to address in the IEP developed on October 6, and 25, 2022, Student's alleged regression in behavior.

Turlock prevailed on Issue 5.

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#### ISSUE 6a:

Turlock did not deny Student a FAPE during the 2022-2023 school year, by denying Parents meaningful participation in the October 6, and 25, 2022, IEP team meetings, by failing to offer new IEP goals in academics, organization, and behavior.

Turlock prevailed on Issue 6a.

#### ISSUE 6b:

Turlock did not deny Student a FAPE during the 2022-2023 school year, by denying Parents meaningful participation in the October 6, and 25, 2022, IEP team meetings, by failing to grant Parent's requests for a one-to-one aide and parent-teacher communications.

Turlock prevailed on Issue 6b.

#### ORDER

All Student's requests for relief are denied.

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## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

ALEXA HOHENSEE

Administrative Law Judge

Office of Administrative Hearings